(3)

No. 85-5238

In the Supreme Court of the United States

OCTOBER TERM, 1985

MAJOR CRANE, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 12, 1985
CERTIORARI GRANTED DECEMBER 9, 1985

83 pp

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 19, 1982—Jefferson District Court, Juvenile Session waives jurisdiction over petitioner's case and enters order transferring jurisdiction to the Jefferson Circuit Court.

October 13, 1982—Petitioner was indicted by the Jefferson County Grand Jury.

March 24, 1983—Petitioner filed a motion to suppress his statement to police officers.

October 31, 1983—Suppression Hearing Conducted in the Jefferson Circuit Court.

November 2, 1983—Findings of Fact and Conclusions of Law filed by the Jefferson Circuit Court.

November 29—December 1, 1983—Petitioner was tried by a jury in the Jefferson Circuit Court and convicted of wanton murder. The jury recommended a sentence of forty (40) years imprisonment.

December 8, 1983—Petitioner filed a motion for a new trial and a memorandum in support thereof.

December 12, 1983—Petitioner's Motion for a New Trial is overruled.

January 5, 1984—The Jefferson Circuit Court entered its final judgment sentencing petitioner to forty (40) years imprisonment.

February 28, 1985—Kentucky Supreme Court rendered its opinion affirming petitioner's conviction.

June 13, 1985—Kentucky Supreme Court entered an order denying the petition for rehearing filed by petitioner.

August 12, 1985—Petition for a Writ of Certiorari is filed in this Court.

December 9, 1985—The Petition for a Writ of Certiorari is granted.

[SUPPRESSION HEARING TESTIMONY OF DET. DONALD BURBRINK, SUPPRESSION HEARING TRANSCRIPT, PP. 6-26]

MR. STENGEL: The Commonwealth would call Detective Donald Burbrink.

The witness, DONALD BURBRINK, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STENGEL:

* * * *

Q1 Sir, for the record, would you state your name, please.

A Detective Donald Burbrink, Louisville Division of Police, Fourth District.

Q2 Sir, in your own words, would you tell the Court how you first came in contact with the Defendant here, Major Crane, on 8/14/81.

A Yes sir, on 8/14/81, we were in the Fourth District Office. We received a phone call from Officer Whitaker from the First District. He advised us that he had picked up a young white male who was from out at Boys' Haven, I think out there on Bardstown Road. I am not sure that it is Boys' Haven but it is out on Bardstown Road, a youth home.

The boy said he had been with a couple of black guys down in the westend, that he had run away from home and had run into a boy by the name of Major Crane, and that day had been down in the westend and broke into a service station. He asked me if any service stations had been broken into the night before. At that time, I said there was one, a body shop up on 28th Street that was broken into.

He said he was getting off and he would send somebody down with this boy to point out the service station.

Officer Herbst came down with the boy and rode around and he showed us the service station that was broke into was the Park and Gulf Station located at 2714 Duminil. He advised us that it was him and Major Crane. They took some batteries, etc. At that time, we went back to the district and he saw Major. He said there is Major Crane right there. This was around Southern and Catalpa. So he picked Major up. It was about 1752 hours and took him to the Fourth District Substation. At that time, Sergeant Cummings sent a car up to the Park and Gulf Station to obtain a report because there was none at that time available.

As they were in the process of getting the report, I went ahead and started typing up an arrest slip. We took Major back to the Fourth District Substation and he was given his rights orally at approximately 1801 hours and he was also offered a written rights form about 1805 hours.

Q3 Did you give those to him, sir?

A Yes sir, I did.

Q4 Did you take any special precautions in giving him the rights or would you tell the Court exactly what you did there.

A First of all, I advised him of his rights orally. I said, you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer prior to any questioning or making of any statements and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed by the court to represent you before any questioning, if you so desire. I asked him if he understood his rights and did he want to talk. He just said yeah, I know, I have been through this before. At that time, I wrote up a rights form and handed it to him and it sat there on the desk. I don't recall; I don't have it. It was in the juvenile thing as evidence and I don't have it back.

Q5 It was submitted in Juvenile Court as evidence down there?

A Yes, it was. So I don't recall if he signed it or not. At that time, I asked him for his mother's phone number and I called the number, which was 776-4364 and wrote down the time as being 1806. At that time, he was charged with Burglary, Third Degree. I talked to an aunt and told her of the Burglary, Third Degree charges and told her that we would have him up in the Dentention Center within an hour and she could call up there and at that time, they would advise her if they were going to keep him or send him back home to them of what time the court appearance would be. She said she would contact his mother and they would come up to the Detention Center within an hour.

At that time, as I was sitting there typing the arrest slip on him, Major was sitting in some chairs right there at the end of the desk. And just out of the clear blue sky, he said, "I confess." He said, "I confess". I said, "Confess to what?" He said, "I confess to robbing the hardware store out there on Dixie Highway next to Convenient." I kind of just looked at him and I really didn't pay him too much mind. He said, "I confess to shooting that police officer." He said, "I shot that police officer out there." He said, "I think I shot him in the face." I said, "what are you talking about?" He said, "Out there off Dixie Highway, I shot that police officer." He said, "Right before that, we robbed them people over at the bowling alley." I said, "Over at Big A?" He said, "Yeah, at Big A." And I was familiar with the county cases at that time that they were working on.

Q6 Excuse me, a point of clarification for the benefit of the Court here. The shooting of this cop is another shooting and has nothing to do with this case, is that right?

A That is correct. At that time, I told Sergeant Cummings to go out and tell Detective Highland to call County Robbery and have them meet us down at the

Youth Bureau, our Youth Bureau in City Headquarters, that they may have a lead on a couple of robberies they had been working on.

Q7 Okay, those were in the county?

A Yes, they were. So at 1825, we left the District with the arrest slip and took him to the Youth Bureau. On the way down, I again told him, you know your rights. He said, "Yeah, I know, I know what they are." So as we were riding on down, I asked him a little bit more about who was with you on the robberies because we knew there were some othe rsubjects. He knew one subject being Juan Downs. He said the other guy's name is Gregory. He said, "I don't know what Gregory's last name is." He said, "He has got a brother that is in the Youth Camp named Kevin who shot somebody." He said, "Gregory also shot a guy and put him in a wheelchair." So I knew who he was talking about. I knew it was Gregory Powell was one of the subjects he was talking about.

Then we asked him about any other thing he had done and if he knew anything about any of the other places around that had been robbed, and about the Keg Liquors. He said, "No, I don't know anything about that. I've never even heard of that." So we arrived at the Youth Bureau about 1838. So we left the Youth Bureau, by the time we got done with the paperwork, at 1859.

Q8 Could you explain what is done there at the Youth Bureau, why you have to stop?

A According to our policies and procedures, all the records, etc. for a juvenile is kept in one central location, which is the Youth Bureau. So in order to keep the records updated, you have to take them down there where they take pictures and fingerprints and add them to their file. That is where all the case files are kept for the juveniles.

Q9 Okay, and you arrived there when?

A We arrived there at 1838. Major asked me if he could have a coke, so we went and bought him a coke

and went down to the basement there and bought him a coke and some chips and took him up to the Youth Bureau. At that time, they went through their paperwork which is pulling his file, typing up another slip that has to be given at the Detention Center. We left there and went to the Detention Center and arrived there about 1908 and walked in. There is a long counter there. At that time, the people who were in charge, we handed them the paper and they searched Major. And at that time, we asked if we could have a booth in order to talk to him. And they arranged for us to have a room off of one of the corridors there in order to talk to Major.

Before we went back, I called his mother. Again, that was at 1912 and there was no answer at home. And the only thing I could assume is that they were on their way up there because the aunt said she would get the mother and come up to the Detention Center at the time. We called again at 1945 hours with no answer. We went in and took a taped statement from Major in regards to the Keg Liquors robbery and murder.

Q10 When was the first time he said anything about, other than the earlier denial in the car, when was the first time he said anything about knowing anything about Keg Liquors?

A When we were in the Detention Center.

Q11 And do you have the time on that?

A No, I don't have the exact time when it was. It was going through his statement that he gave which started at 1950 hours.

Q12 Fifty or fifteen?

A Fifty.

Q13 And had there been any discussion before the actual statement?

A What he said down at the District and what he said along the way down to the Youth Bureau was talked about in the car—who he was with, etc., but as far as the Keg Liquors, no, there was none until we were sitting up the tape in the room there. He was talking about the

robbery at Brown's Hardware. He said, "The guy hit a buzzer and an alarm went off and I shot up in the air." At that time, I said, "Well, there was nobody shot at Brown Hardware." He said, "No, I am talking about Keg Liquors." He said, "That is where I am talking about is at Keg Liquors where that guy got killed." At that time, we went back and started the tape and went over his rights again. Detective Branham was the one who mainly did the questioning on the tape.

Q14 How many attempts did you make to contact Major's family? Will this reflect also what Detective Highland did?

A I made 10 attempts to contact his family.

Q15 And those ran from when to when?

A When we first picked him up at 1806, we called then, called when we first got to the Detention Center, called before the statement started, called immediately after the statement and kept calling from there on until I finally talked to his grandmother and advised her of the—well, I talked to a cousin at one point and she wouldn't let anybody else get on the phone. I don't know who she was. I wanted to advise them of the charges that were going to be placed against him. She wouldn't let anybody else get on the phone. So I didn't want to advise her. I didn't know how old she was. So I kept calling and finally talked to the grandmother and we told the grandmother of the charges that were placed against him at that time.

Q16 By that time, when you talked to the grandmother, that's after you had added the Murder charges?

A Murder and all the Robberies, yes sir.

MR. STENGEL: Would you answer Mr. Jewell's questions, please.

CROSS EXAMINATION

BY MR. JEWELL:

Q1 Okay, Detective, the first contact the police had with Major Crane was at approximately 1801, correct?

A We picked him up at about 1752 hours. Now as far as talking—is that what you are talking about, or as far as when we picked him up?

Q2 The first contact. Now you are saying 1752?

A I said that earlier, yes.

Q3 That is what—5:52 p.m.?

A Yes sir. That is when we picked him up on the street.

Q4 And then you had him at the Fourth District until 1825, correct.

A Yes sir. We arrived at the Fourth District about 1800 hours. We had him there approximately 25 minutes.

Q5 And that put it at 6:25 p.m.

A Yes sir.

Q6 And then you went to the Youth Bureau and you finally got to the Detention Center and the Youth Center at 1908, correct?

A Yes sir.

Q7 7:08 p.m., correct?

A Yes sir.

Q8 Now the Youth Bureau that you referred to that you went to directly from the substation, that is in City Police Headquarters, correct?

A Yes sir.

Q9 And by the Youth Center, we are referring to a separate building over here at 8th and Jefferson, correct?

A Yes sir.

Q10 Now you do not have with you any signed waiver of rights taken at the substation or the Youth Bureau, correct?

A There was none offered to him at the Youth Bureau. At the substation, there was one. It was submitted when the Juvenile Court hearing was done downstairs.

Q11 Are you sure that was signed?

A As I said, I don't remember if it was signed or not. I offered it to him. It sat there. I picked it up as we left. I don't recall. It has been over a year since we even had the hearing. So I can't recall if it was signed or not. I don't have it here with me. It is not available to me.

Q12 You got a waiver signed at the Youth Center, correct?

A One of the county waivers, yes sir.

Q13 Do you have that waiver with you?

A I've got a Xerox copy of it.

Q14 And that waiver was signed at 1945, correct?

A As far as it reads here, yes sir.

Q15 That would be 9:45 p.m., is that correct?

THE COURT: 7:45.

A 7:45.

Q16 7:45, rather. Now when you went to the Youth Center, you took him into a room to question him, correct?

A Yes sir.

Q17 And who all was in that room?

A It is hard to say at one time. There was myself and Major Crane, Detective Branham, Detective Milburn were in there, I think constantly. Milburn may have left once or twice during that time. Myself and Detective Branham were always in there. Detective Highland came and went in order to take care of some other business. Sergeant Cummings was there and came and went.

Q18 Would that be all the people then—five police officers and Major Crane?

A Not at one time, no sir.

Q19 But I mean off and on that evening?

A Yes sir.

Q20 That would have been the sole people who would have been in there that evening?

A To the best of my recollection, yes sir.

Q21 Detective, you stated earlier that Major told you about shooting a police officer on Dixie Highway. This statement actually referred to a shooting incident on Kennedy Avenue, correct?

A That is off Dixie Highway, yes sir.

Q22 And in that incident, it was later discovered that Greg Powell was the one who did the shooting, correct?

A I don't believe that was ever found out for sure.

Q23 Mr. Carney was the victim, correct?

A Yes, it was.

Q24 And were you present in court both downstairs or upstairs when he identified Greg Powell as being the one who shot him?

A No, I wasn't.

Q25 Are you aware that Greg Powell has been convicted of that charge?

A I know he pled guilty to that charge, yes sir.

Q26 And you also stated that the first reference to Keg Liquors was when Major stated to the effect that a man pressed a buzzer and he shot in the air, correct?

A Shot up in the air towards him, yes sir.

Q27 And you are aware, are you not, that Keg Liquors had no buzzers or alarms at that time?

A I am not aware as to my own knowledge. No, I was told that but I don't know.

Q28 And were you told that by people at the Liquor Store?

A No sir.

Q29 Who were you told that by, sir?

A Detective Branham.

Q30 And he was one of the officers investigating that case for the county, correct?

A Yes sir.

Q31 When was the first time then that you informed Major's family that he was being either questioned or held on murder charges?

A They were advised at 1806 that he was being arrested on Burglary, Third Degree charges. From then on out, we could not raise anyone or talk to anyone. We left a note at the front desk when we were questioning him if his mother or aunt should come in, to appraise us of the situation and we'd come out and advise them

what we were questioning on. The next time I contacted someone, it was a cousin at 2100 hours. I did not know her age and was not going to tell her anything. She would not put an adult on the phone; at 2115 hours, I talked to the grandmother, or someone who said she was Major's grandmother and advised her.

Q32 What time was that now?

A 2115 hours and advised her of the charges being placed against Major.

Q33 That would be 9:15, correct?

A Yes sir.

Q34 Now the statement that you took at the Detention Center, the recorded statement, was started at 1950, correct?

A Yes sir.

Q35 And it ended at 2040, correct?

A Yes sir.

Q36 It would be 7:50 and 8:40 p.m., correct?

A Yes sir.

Q37 At any time during that interval, was Major himself allowed to use the telephone?

A No sir, he never asked.

Q38 Between your arrival at the Detention Center when you went to the room to interrogate Major and when you finally brought him out, did he talk to anybody except police officers?

A Not to my knowledge.

Q39 Do the statements at the District, in the car on the way to the Youth Bureau, in the tape recorded statement at the Detention Center, constitute all the statements in this case?

A From Major?

Q40 Yes.

A I don't know if it got back on tape. There was a statement he made in the bathroom. After we had got done, he wanted to go to the restroom and myself and Detective Highland took him to the restroom. He told us that he did not use a 357 at the Keg Liquors, that it was a 32 is what he shot the man with.

Q41 That is not included on the tape, correct?

A I do not know. I didn't get a chance to read it. I know that in Detective Branham's letter, I believe it is—

Q42 I am asking you about the tape, Detective, not a letter.

A I don't know. Do you want me to look through the tape and read it and see if it is.

Q43 Please do.

A No, it wasn't on the tape as far as I could tell.

Q44 On the tape, he stated that the weapon involved was a 357 magnum, correct?

A That is what he stated, yes.

Q45 And that was not the weapon involved, correct?

A It was a 32.

Q46 On the tape, he stated he took some money from the liquor store, correct?

A That is what he said on the tape, yes sir.

Q47 Did subsequent investigation reveal that amount of money taken from the liquor store?

A I wouldn't know.

Q48 Are you aware from talking with Detective Branham?

A I wouldn't know.

Q49 On the tape, did Major give you a time of day that this happened at Keg Liquors?

A It was at night. I don't know that he said exactly, what exact time it was.

Q50 I refer you then to a statement, I believe it is about the 12th page of the tape recorded statement. Yes, it is page 12.

A Go ahead.

Q51 About three fourths of the way down the page, does it not reflect that Major Crane in response to Detective Milburn who asked, "Do you know about what time it was during the day?" He states, "It was about five, about four or five o'clock."

A I see that.

Q52 And on down, do you see where it states, Major stating: "It wasn't dark yet. It was going—it was about an hour, no, it was a little while later and it would have been geting dark." Do you see that?

A I see it.

Q53 And are you aware of the time the Keg Liquor Store incident actually occurred?

A No, I am not.

Q54 Now this incident at Keg Liquor Store was being investigated by the county, correct?

A Keg Liquors, yes sir, it is in the county.

Q55 And you would not have had all the details of that offense when you first started talking to Major, correct?

A We had talked to them about it. I had enough grasp of the information that I knew—I didn't know the exact times, etc.

Q56 You didn't know the time it occurred nor if any money was taken, correct?

A No, I did not know. I just know what they told me.

Q57 What time was it when you turned Major Crane over to the workers at the Youth Center?

A As soon as the statement was done, after he went to the restroom to go to the bathroom, we turned him back over to them.

Q58 Did you put in your notes what time that was?

A I assume it was about 2045 hours because I called Judge Fitzgerald at that time to ask him about something which pertained to the case and at that time, he called you and you called me back and told me, "Don't talk to him anymore."

Q59 So that would be about 2045, correct.

A That is about what time.

Q60 That is what you are saying, correct?

A That is about what time I am saying. I called Judge Fitzgerald at that time. I think they had him at that time because I was out using the phone. So I don't know exactly what time it was they gave him to them.

MR. JEWELL: I have no further questions.

REDIRECT EXAMINATION

BY MR. STENGEL:

Q1 Sir, you just said you turned him back over. When you reported in there, you actually gave him to them?

A Gave them the paperwork and they searched him which is their procedure. At that time, we asked them for a booth and they gave it to us and we put him back in there.

Q2 You were more or less in a visiting room or what kind of room?

A Well, it was off the—as you walk in, there is a counter there where the intake who take over the people stand and then there is a hallway as you go off to the left to go to the restrooms and they've got a coke machine and a chip machine, etc. there. It was a room off of that, off a corridor.

Q3 The way I have it figured, there is one hour and 16 minutes from the time you picked him up until the time the taped statement was made. That includes the Fourth District Substation and a stop at the Youth Bureau for their paperwork and directly to the—what is the place called?

A The Detention Center.

Q4 Were there any extra delays, special delays or purposeful delays anywhere along there?

A The only delay was when he asked for a coke and a bag of chips. We had to go down to the—it is in the basement of police headquarters. We park down there and it is right next to the elevators. We stopped in there. For ever how long it takes to get a coke out of the machine and some chips out of the machine, that was the only delay that I could think of.

* * * *

[EXCERPTS FROM SUPPRESSION HEARING TESTIMONY OF DET. WAYNE BRANHAM, SUPPRESSION HEARING TRANSCRIPT, PP. 30-31]

* * * *

Q13 Now Detective, you had been investigating the Keg Liquor Store robbery and murder, had you not?

A That is correct, yes sir.

Q14 I have a couple of questions I want to ask you about that. Approximately what time of day did that incident occur?

A Approximately 10:40 p.m.

Q15 At night?

A Yes sir.

Q16 And was there $300 to $400 taken from that liquor store?

A No sir.

Q17 Was there any money taken that you could determine?

A No sir, not according to the owner of the store, there wasn't any money taken.

Q18 And was there any alarms or buzzers in that liquor store?

A No sir. There is a camera, simulated camera that is in that store but apparently it wasn't working. It is a fake camera is what it is.

Q19 What I am asking, is there any alarms, anything that would have sounded—had sirens going off or anything inside the store?

A No sir.

Q20 Do you remember in the statement Major Crane talking about how he panicked when he heard the alarm —correct?

A I don't have a copy of the statement. I do recall him mentioning something about sirens.

Q21 About how long did this statement take?

A I don't recall exactly how long, probably 30 or 40 minutes. I am not sure.

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[EXCERPTS FROM SUPPRESSION HEARING TESTIMONY OF MAJOR CRANE, SUPPRESSION HEARING TRANSCRIPT, PP 46-52]

* * * *

DIRECT EXAMINATION

BY MR. JEWELL:

Q1 State your name for the record, please.
A Major Crane.
Q2 Where were you born, Major?
A Right here in Louisville.
Q3 When were you born?
A 1965.
Q4 Do you remember back to August of 1981 when you got picked up by the police?
A Yes sir.
Q5 You were picked up down around Catalpa, correct?
A Yes sir.
Q6 Where did you go from there?
A I went to the Fourth District.
Q7 And what did you do there?
A We went in there and they—we was sitting—first, they took the handcuffs off me and the dude, me and the white dude that was in there. They took me back to the room and we sit there and they was telling me about my Burglary charge and about what I was charged with, about Burglary and things.

After they told me about my Burglary charges, they took the white dude out of the room and then he was asking me about some Robbery charges when we was down there. He was asking me about Robbery charges, you know, and about some more different things about my charges, about what I got now.

Q8 Did you volunteer this information to him or did he ask you?
A He asked me.

Q9 And then what happened?
A We was sitting there and he was asking me about some different robbery charges that had occurred behind the—I'm not for sure where it was. It was just some different robbery charges that he said had occurred in different places.
Q10 Who is the "he" you are referring to?
A The police officer that came in there first, Officer Bur-
Q11 Burbrink?
A Yes, that's him.
Q12 Continue, please.
A Then after he got finished asking me about it, some more police officers came in and they was all talking. He was still talking to me and things, still asking me about what I had did and things like that and I kept telling him that I didn't rob nobody. I hadn't robbed nobody and he was talking about the man—then he brought it up about the man that had got shot out on—I think it is off Dixie Highway, talking about the man that got shot off Dixie Highway. He kept talking to me about that. He was just saying about what they was going to do to me if I didn't sign some—they had some papers there that they wanted me to sign. They was talking about what they was going to do to me if I didn't sign some things.
Q13 Was this at the substation?
A This is at the substation, Fourth District.
Q14 Did you later leave the substation?
A Yes.
Q15 And where did you go from there?
A I want over to—right over across the street to Police Headquarters, to the Youth Bureau in that little room.
Q16 And what happened there?
A We went—after we went up, he asked me, he said as we was on our way up from the basement of the place, he asked me, said do you want something to drink or something to eat? I told him, I said yeah. So he got

something; he got me a Coke and a bag of chips. And he took me upstairs and he said well, we are going to have to sit and wait for two more police officers to come in from the county or somewhere. So we sat there and waited. And they came in and they was telling me—they took my fingerprints and stuff over there, I think, and took pictures of me. And then they said, well we are going to take him over to the Youth Center and interrogate him. They took me over to the Youth Center. After they took me over there, I got searched. I think I got searched and everything and I went in and I went on back to that little interrogation room. They was telling me what I was going to say on the tape recorder and if I didn't say it, what they was going to do to me, you know.

Q17 Why don't you describe this room for me that you went to over there?

A Just a little small interrogation room. It could hold about five or six people or more.

Q18 Was there anybody else in there with you but police officers?

A That is all that was in there was police officers.

Q19 And was this room where you could see the other workers at the Center, the social workers there?

A No, it was just a little closed room; it is a little bitty room, something like a closet. It is bigger and it is closed up. There ain't no windows or nothing, you know. It is just bricks around you.

Q20 And who was talking to you then?

A Officer Burbrink and the other officer that was sitting there. I can't think of his name. There was another one that talked to me. There was three of them that talked to me then. I think there was about six of them in the room at the time, when they was questioning me.

Q21 And do you remember signing a waiver of rights form?

A That is what I—that is the piece of paper that I was telling you about where they was telling me if I

didn't sign, what they was going to do to me. The piece of paper, they was talking about if I didn't sign it, they was going to put me on the tape recorder and stuff.

Q22 And why did you sign this piece of paper?

A Because I was scared. I didn't want them to be beating on me.

Q23 Why did you think they would be beating on you?

A Because they had said what they was going to do.

Q24 What did they say?

A They was talking about if you didn't sign the papers, we are going to knock your head off and all of this. We are going to do this to you, you know. So I went ahead and signed the papers like they said.

Q25 Did you want to talk to the police officers that night?

A No, I didn't want to talk to them.

Q26 What did you want to do?

A I wanted to go ahead where they could take me on down to the Youth Center where they could call my mother to see would she come and pick me up.

Q27 Did you ever ask to call your mother?

A Yes, when I first got to the Fourth District, I asked to call my mother.

Q28 Did you call her?

A No.

Q29 What did they say when you asked to call her?

A He told me, said you are not—exactly what he said, he said you are not calling nobody until we get finished with you over here.

Q30 And did you ever request to call your mother again at the Youth Center?

A When we got over to the Youth Bureau, I asked could I call and they told me I couldn't call over there.

Q31 When you signed this piece of paper, did you realize what you were doing? What did you think you were doing when you signed this?

A My mind was not functioning at the time. I wasn't thinking, you know. They just told me to sign the paper. I signed it because they was threatening me. It didn't make me no difference what was on the paper because I wasn't thinking. I was just scared.

* * * *

JEFFERSON CIRCUIT COURT
FIRST DIVISION

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs

MAJOR CRANE, DEFENDANT

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The defendant came before this Court, pursuant to RCr 9.78, on the 31st day of October 1983, and challenged the admissibility of oral and tape recorded statements and alleged violations of the defendant's Constitutional rights as well as technical violations of KRS 208.110 and KRS 208.192. After hearing testimony from both the Commonwealth and the defendant's witnesses, including the defendant himself, this Court finds:

1. There was no sweating or coercion of the defendant.
2. There was no overreaching by the officers of the Louisville Police Department or the Jefferson County Police Department.
3. There was no delay in taking the defendant to the Youth Detention Center.
4. The credibility of the witnesses in a comparison of the defendant and the various police officers lies entirely with the police.
5. The defendant's academic achievement may very well be at a fourth or fifth grade level, but he has had

numerous experiences with the law and showed himself to be "street wise" in his testimony and it is the belief of this Court that he fully understood his rights to counsel and against self-incrimination.

ORDER

In light of the above findings, it is the order of this Court that the defendant's Motion to Exclude his Statements is hereby OVERRULED.

/s/ Joseph H. Eckert
JOSEPH ECKERT
Judge

Date 11-2-83

**[EXCERPTS FROM TRIAL TRANSCRIPT
(TE VOL. I, PP. 15-22)
OPENING STATEMENT OF DEFENSE COUNSEL]**

• • • •

MS. BAILEY: Judge Eckert, Mr. Stengel, ladies and gentlemen of the jury. You will be presented with evidence of a very serious and a very important case. It is a case where an 18-year-old boy, Major Crane, is charged with murder. The evidence, we believe will show two very different accounts of what happened at Keg Liquors on the night of August 7, 1981. The first account is a statement which Major Crane gave to the police, seven days after the shooting at Keg Liquors. In that statement, he related what happened at Keg Liquors that night. So you might be asking yourself, well, then why are we here today? Why are we having a jury trial? Why doesn't he just plead guilty? There is one answer to that question, ladies and gentlemen, and that is, Major Crane is not guilty of this offense.

The story that he told the police is just that, a story. There are inconsistencies throughout that story—things that just don't match up with what we know for certain happened that night. We believe that that contrast is enough to create a reasonable doubt in each one of your minds as to Major Crane's guilt.

The very circumstances surrounding the giving of the statement are enough to cast a doubt on its credibility. Major Crane was taken to the Detention Center, the Juvenile Detention Center, for questioning on the night of August 14th by Detective Burbrink. The evidence will show that he was brought there at 7:20 that night and that he wasn't turned over to the custody of the Detention Center until 9:00 p.m. He was taken to a room away from the staff of the Detention Center by the police. He was behind closed doors with the officers for an hour and 40 minutes. The only people present in that room were

the officers, five officers and Major Crane, a 16-year-old boy.

At this time, I would like to outline for you some of the inconsistencies which we believe the evidence will show between what Major told the police that night and what actually happened seven days earlier. He began the statement with just a narrative of what happened. The police just let him talk. He portrayed what could probably be termed as a pretty ordinary holdup of the store. He said that he met up with his Uncle George that day, that his Uncle George told him that he was out of a job and Major was carrying a 357 on him. His uncle went into the liquor store and a few minutes later, Major walked in and said, "This is a holdup." About that time, he heard sirens going off. The clerk had touched the alarm button in the store. Sirens went off; buzzers sounded. Major shot up in the air, grabbed some money and ran out of the store. And he says that his uncle, George Williams, grabbed some money and followed him. And that is the end of the story.

Now the police know when they heard this that this isn't any different than any other child's version of a holdup. So they asked for details. They started asking him questions. They asked him, Major, why don't you describe the store for us. So he says, well, there is a counter and there is wire fencing around that counter, and he tells the police where the soda pop is located in the store and where the potato chips are located, but he also tells the police he has been in the store several times before with his grandparents.

So they say, well, Major, where did this money come from that you said you took. You said you took $300 or $400. Where did you get it? Major goes into pretty much detail as to how the clerk reached up under the cash register and there was a drawer there, pulled it out, and that is where the big bills were kept.

But ladies and gentlemen, the evidence will show that no money was taken from the cash register. The police

checked the tape right after the shooting and no money had been taken. The cash register hadn't been tampered with. The police asked him, well, what was on the counter? What did you see on the counter? Major said a liquor bottle. Now ladies and gentlemen, what would you expect to find in a liquor store on the counter? And he also didn't mention that there was 11 cans of Stroh beer on that counter or that there was a brown paper bag. What time of day did this happen, he was asked. He said about four or five in the afternoon. It was still light out. It hadn't gotten dark yet. Ladies and gentlemen, the evidence will show the shooting took place at 10:40 p.m. that night. It had to have been dark by that time. Then it got down to the crucial question. What kind of gun did you use, Major? A 357 just like I told you earlier. A 357—are you sure it was a 357? They tried their best to get him to say it was a 32, but it wasn't. It was a 357. I know the difference between guns. My uncle has guns and I've seen guns and I used a 357.

There was only one factually correct response that Major gave to the police that night and that was that a shot was fired in Keg Liquors. So how is the Commonwealth going to prove to you its case of murder beyond a reasonable doubt? They don't have any scientific evidence. They looked for fingerprints. They took fingerprints out of the store. None of those matched Major's. They found a footprint outside the store in some sand. There was no return on that as to that being Major's footprint either. They found some tire tracks and they made pictures of those. Those don't appear to be linked to anything that had to do with Major. And they searched for the gun. They searched for that 32 and they couldn't find it. So what is the Commonwealth going to do? All it has is this confession, this confession of all the inconsistencies. What is going to bolster its weak case but even weaker evidence and that is the testimony of the uncle, George Williams.

Ladies and gentlemen, as Mr. Stengel told you, when Mr. Williams was first picked up, first questioned about this incident, he said he didn't know anything about it; I don't know what you are talking about. It wasn't until after the police continued questioning him and after, according to George, he heard Major's statement that he then decided he better make a deal with the Commonwealth—I'd better protect myself. And that is what he did. Why shouldn't you believe his testimony? Why should you question the credibility of Mr. Williams? First of all, he is a convicted felon. Not just because he pleaded guilty of murder and robbery in this case, but because he has quite a string of prior convictions.

Secondly, he got such a sweet deal from the Commonwealth pleading guilty to murder and robbery in exchange for testimony against Major Crane. In reality, he is not going to have to serve one extra day in prison for his guilty plea to those two charges—serious charges. Ladies and gentlemen, there is just not one scientific fact to link Major Crane to the incident at Keg Liquors. There is not going to be one witness that is going to take this witness stand and tell you, yes, I saw Major Crane at Keg Liquors, except for George Williams, who made such a good deal with the Commonwealth. So what is the results of this case? We believe that you will find that the result is the police took the easy way out. They got a confession from a sixteen-year old kid and they are going to rely on that confession, even though there are inconsistencies and discrepancies all throughout.

The Commonwealth Attorney, they realized this isn't a very good case. This confession is not going to be enough, not to convince a jury beyond a reasonable doubt that this boy is guilty of murder. They made a deal and that is the evidence you are going to hear today. That is the evidence that you are going to have to base your verdict and we believe that after you hear all of this evidence, you are only going to be able to return one verdict and that is a verdict of not guilty.

[EXCERPTS FROM TRIAL TRANSCRIPT
(TE VOL. II, PP. 3-8)
PROSECUTOR'S MOTION IN LIMINE]

* * * *

(Bench discussion before jury enters courtroom:)

MR. STENGEL: Yesterday, in the opening statement, the defense indicated that their basic tact is going to be, once again, to attack the voluntariness of the confession and coercion. I think that was a judicial or a legal matter which has been ruled upon by the Court and is not something which is tried before a jury.

THE COURT: That is correct.

MR. STENGEL: I would move to have motion in limine to block the defense from bringing out testimony along those lines. In the alternative, if they do bring that out, I would want to be able to go into the background of this boy to show what his sophistication is, etc., to show that he was not in any way—

THE COURT: Let us see if we can cut through this without getting into a lot of side roads or side issues. The determination made by the Court, Mr. Jewell will recall, was that the statements made were not coerced, were not violative of any constitutional rights and therefore, the issue of whether that was voluntarily given is not up for grabs. I believe that is the status of the law. Now does the defense intend to attack again?

MS. BAILEY: I wasn't arguing voluntariness.

THE COURT: I kept waiting for Commonwealth to object during your opening statement.

MS. BAILEY: I specifically stated right before I went into that, that the surrounding circumstances casted doubt on its validity and its credibility. I didn't say it casted any doubt on its voluntariness.

THE COURT: Well, part of your opening argument was to paint the picture of a 16 or 17-year old young lad held for an hour or close to two hours only by himself, etc., etc. The Commonwealth did not object but the ruling

of the Court is you may not attack the voluntary giving of that statement.

Now you may bring in any inconsistencies which you feel exist, but the voluntary nature of the statement and its admissibility—that has already been ruled upon.

MS. BAILEY: I know that, Your Honor.

MR. JEWELL: Can we develop in front of the jury the length of time which he was held during the giving of this statement?

THE COURT: No.

MR. JEWELL: Can we indicate to the jury the fact that he was alone with the police officers?

THE COURT: No.

MR. JEWELL: The Court is ruling all questions along those lines inadmissible?

THE COURT: Mr. Jewell, if you have law to the contrary, as an officer of the Court, you are under an obligation to disclose that to the Court at this point in time. I do not intend to be scurried on my own rulings; if defense counsel has law to the contrary, if you point out to me that that be error, now is the time to address it.

MR. JEWELL: Your Honor, I don't have a case on point at this time. I believe that that would go to the validity of the confession, not just to the voluntariness that should be addressed to the jury. I will be happy to look the law over at lunch for the Court.

THE COURT: Well, to that point in time, Mr. Jewell, and subject to the Court's reading such law as you present, the ruling of the Court is that it had previously ruled that the confession and the admissions or whatever they are were not violative of any of his rights and therefore could be admitted. Inconsistencies in those statements, of course, may be pointed out to the jury. But we are not going to again try the issue before this jury as to voluntary giving of this statement. Okay?

MR. JEWELL: I understand that ruling. I was asking the Court so I don't object to the cross examination

of those specific questions which I feel will go to the credibility of the voluntariness of it.

THE COURT: Well, as to credibility and inconsistencies, I think you may go into that. As to the reasons which you say, they seem to the Court to smack of voluntary giving or the nature of the statements being given voluntarily and that is beyond pale at this point in time.

MR. JEWELL: So specifically, I cannot ask about the length of time or the fact that he has been alone with the police officers?

THE COURT: Correct. Until you provide to the Court some law or ruling that indicates that you may attack again the admission of the statement, that is the ruling of the Court.

MR. JEWELL: I will ask the Court to be allowed to call the officers involved in this statement, to be given an opportunity to ask those questions by way of avowal outside the presence of the jury.

THE COURT: Oh, boy, okay, fine. You, of course, have that right.

MR. STENGEL: If you could give us maybe two seconds to be sure we have these things properly X'ed out and Branham understands on that statement.

OFF THE RECORD.

(Jury re-enters courtroom)

THE COURT: The record will reflect that the jury reconvened at the hour appointed by the Court. Ladies and gentlemen, you will recall yesterday that you were chosen as the 13 jurors in this case after a rather extensive voir dire examination. You then heard an opening statement given to you by the Court and you heard opening arguments given to you by counsel. We are now moving into that phase of the case where you will hear the evidence offered by the Commonwealth. They have now called their first witness.

MR. JEWELL: Your Honor, may we approach the bench.

THE COURT: Yes sir.

(Bench discussion:)

MR. JEWELL: I just need to note for the record our continuing objection to the statement coming in. I believe I have to renew the objection, even though I moved to suppress it in order to properly preserve it.

THE COURT: The objection is noted and the objection is overruled.

(Conclusion of bench discussion)

[EXCERPTS FROM TRIAL TESTIMONY OF DETECTIVE WAYNE BRANHAM (TE VOL. II, PP. 13-40)]

* * * *

DIRECT EXAMINATION

* * * *

A At 6:15 in the afternoon, I received information from Sergeant Cummings of the Louisville Police Department that he had arrested a male subject and he felt the subject had information in regards to this offense.

Q20 Who are we talking about here?

A We are talking about Major Crane.

Q21 That arrest had been made before you were involved in the case?

A That is correct, yes sir.

Q22 All right, sir, then did you talk to Major Crane any time that day?

A Yes sir, I did.

Q23 And when was that, please?

A That was on 8/14/181 and it was at approximately 7:50 at the Youth Center on West Jefferson Street.

Q24 Okay, sir, and could you tell us what happened as a result of that?

A Okay, after we advised Mr. Crane of his rights, we made a taped statement with him there at the Youth Center.

Q25 Has that taped statement been reduced to writing?

A Yes sir, it has.

Q26 Do you have a copy of it?

A Yes sir, I do.

Q27 Could we go through that, please.

A Okay, you want me to just read it—is that correct, sir?

Q28 Yes sir.

A Okay, this is me speaking and setting up the tape. I say: "Okay, today's date is 8/14/81. The time now is 2050 hours; present at 720 West Jefferson."

Q29 For the jury, that is 8:50, correct?

A Yes sir. ". . . present at 720 West Jefferson, Juvenile Detention Center, Detective Wayne Branham speaking. Detective Burbrink and Detective Highland with the Louisville Police Department; Detective Ron Milburn with the Jefferson County Police Department and also present was Sergeant Jay Cummings with the Louisville Police Department. We are here to interview a Major Crane who gives a date of birth of 5/16/65, and an address of 1312 South 26th Street. Okay, Major, before we start, I am going to give you your rights again, okay? You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer prior to any questioning and making of any statements and to have him present with you while you are being questioned. If you cannot afford a lawyer, one will be appointed by the court to represent you before any questioning, if you desire. You may stop questioning or making of any statement at any time by refusing to answer further or by requesting to consult with an attorney prior to continuing with the questioning or the making of any statement. Do you understand all that, Major?" Mr. Crane replies: "Yes, sir."

Q30 Continue now.

A Okay, then I ask: "Okay, we are going to talk about an incident that happened at Keg Liquors on Cane Run Road. You just sit and tell us what happened over there, okay?" Mr. Crane replies: "Uh-huh. I know that it was just an old man—not old, not really old, but a middle-aged man that ran the liquor store and we had been watching him because one day, me and Adrian Hardy—you all know Adrian Hardy, don't you? We was over there in the Big A Shopping Center. Somebody ran out and they had robbed somebody over in the Big A—got

robbed and this policeman ran out and his gun—this fat policeman ran out and his gun got stuck on him and he couldn't shoot and a man pulled off in a black Thunderbird and me and little A. D. followed him. We followed the man in the black T-bird all the way down to Carter Hall where that liquor store is in Irving. He got out of his car and took off running. We thought maybe he was going to leave the keys or the sack of money in the car because the police was after him. Then I said, 'I am going home; I am going home and get the gun.' I told little A. D. that I was going home to get the gun. I didn't tell him what I was going to do. So I went and got the gun. I got the sawed-off and had it and I had the 357 on me while I was walking. Then I saw—I ran into George. Well, that was the same, the day after or the day before, after he had lost his job and he told me about—and he said he was down for some money. I said okay and he said I'll play it off. He walked in and he made like he was buying something. What he was buying, I don't know. Then I ran in there and I told them, "This is a holdup." I told him it is a holdup and then the man—the feet looked like, it was a button or something and his feet touched on the floor and then the sirens and stuff started going off and I shot up in the air. I shot the gun up in the air. I ran out and George was still standing there. And then I think he ran out—he ran on out. After I got some money—I didn't get much. It was about--I got about $300 or $400 out of there and I ran on out and George had already got some money. George was in there getting some money and then he ran out. He walked out—he didn't run. He ran out out, walked on back down Carter . . ."

Q31 Excuse me. I think you misread that. Could you start there . . . "George was in there . . ."

A "George was in there getting some money and then he ran out. He walked out; he didn't run. He walked on out, walked on back down Carter Homes and I met up with him later that night and he said, 'Yeah, I got a bank

roll now.' And I said, 'Yeah, I do too.' I saw George again and then he was still walking around. I asked him where the sawed-off shotgun was and he said, 'I got it put up.' He said, 'Walter got it.' I said, 'Well, here since he got that one, let's let him keep this 357, too.' And now my uncle, Walter Whitaker, is the one that's got the 357 put up in his house." And then Detective Burbrink asked, "Who is George?"

Mr. Crane replies: "The one that just got fired off his job." Detective Burbrink: "And what is his full name?" Mr. Crane: "George Williams, Howard Williams."

And I asked, "Where does he live?" Mr. Crane replies: "Right down there at Carter Homes." Then I asked, "Do you know the address?" Mr. Crane replies: "Huh-huh, I don't know exactly where it is." Is he the one that got locked up for robbing some dude up on Hazel and Duminil?" Mr. Crane replies: "Yeah." Detective Burbrink: "Same George Williams?" Mr. Crane: "Uh-huh."

And then I asked, "This liquor store you are talking about, do you remember what night it was?" Mr. Crane: "Huh-huh." I asked: "How many nights ago was it?" Mr. Crane replied: "I don't really remember what day it was or when it was. It ain't been no real long time since I did."

I asked Mr. Crane to try to describe the store, the liquor store that he was talking about. Mr. Crane replied, "The counter is right there. This is where I left out about that lady getting in that little car. The door is right there in the front and the man standing behind the counter. Some kind of—I don't know what the stuff is. It is like fencing. It is agoin all the way around the thing, you know." "Is it called chicken wire?"

Mr. Crane replies: "Yeah, that's—yeah, they have blocked off now with that stuff and a little opening. Bread thing is sitting right here. It is going straight across like that with potato chips and I think it is canned pop and pops in bottles. Their warm pop and there is a refrigerator sitting there behind the thing where they keep cold pops, cold beer and stuff." Detective Milburn

asked: "Where is it located at?" Mr. Crane replies: "Out there across from Algonquin Shopping Center." Detective Burbrink states: "Is it right there at the light?" Mr. Crane replies: "Yes." Burbrink: "Right across from the Big A Shopping Center? As you come out, it is right across the street?" Mr. Crane replies: "You can come out through that thing from Big A Shopping Center and go straight on across when the light turns. There is a light sitting right there. It is a filling station. There is a big old field and then there is a Bonded Filling Station way down about a block." Detective Burbrink: "When did you find out what happened to the man?" Mr. Crane: "When I read in the paper, when I kept on asking about the newspaper name, my mother was getting upset about it." Detective Burbrink: "What did you find out?" What happened to him?" Mr. Crane replied: "I heard that he got shot but I was hearing that he got shot but I really didn't know until I looked in the newspaper and I saw it and then I just said well, that is just the way I said it—it is just another person, just dead." Detective Burbrink: "Major, did you fire the round off in there before or after you got the money?" Major Crane answered: "After, after I got the money and then he—when I saw his feet move." Milburn asked: "Where did the money come from?" Mr. Crane replied: "Behind the counter." Detective Milburn asked: "Did you get it from behind the counter?" Mr. Crane replied: "He gave it to me." "Did you observe where you got it from? Was it maybe out of a cash register, a safe or . . ." Mr. Crane replies: "It was out of the cash register and it is a little box up under the cash register where you pull the drawer out. You could pull the drawer out like and then I think that is where he keeps most of the large amount of money until they come and pick it up." Detective Milburn: "Do you remember anything about this clerk that was in there? Was it a white man, black man?" Crane replied: "He was a white man." "Remember anything—how he was dressed?" "Huh-huh, I never really pay no attention

to how people is dressed." Burbrink: "Do you remember what he looked like—what color hair he had, if he had a mustache, blond or anything?" "No."

Q32 Beard or anything.

A "Beard or anything." Mr. Crane replied: "No, but he did have hair on his face. Yeah, he did have some hair on his face." Burbrink: "Remember if—kind of long hair or short hair or what color his hair was?" Crane: "It wasn't very long; it wasn't real long but it was—he had normal-size hair." Burbrink: "Was it as long as mine or longer?" Crane: "About like his right there." "Like Highland's?" "Uh-huh, like that." Burbrink: "Was it about the same color of his or was it my color or . . ." Crane replies. "It was a gold-like color. His hair was—I think he used some kind of—I don't know what color it was." Milburn: "Did you put the money in a bag or anything or did he put it in a bag or did you just carry it out?" Crane: "I had a bag; I already had my bag. I had a brown paper sack stuck down in there. I stuck the money in and went on out, went on down to Carter Homes." Burbrink: "Did you notice anything on the counter, like maybe someone had just bought something that was in a bag?" Crane replies: "A half-pint of liquor, that is what it was." "What kind was it?" "It was a half-pint of liquor. I still can't remember what kind it was. It was a half-pint." Burbrink: "George was there at the counter too when you robbed?" Crane replied: "He was at the counter. He was standing like this and the man was standing behind him but I told him, I told him. When I tell him, he got the money and I pulled my brown sack out and put it in the bag and went on out. George was still in there getting money after I had shot him. I didn't know I had shot him and George climbed through that little window and went in there and went behind there with him." I asked, "What little window did he climb through?" Crane replies: "I don't really know. It is a window where they have to give you stuff out of, like get packages and bags, where they have to hand

it out because they just can't hand it to you like in a grocery store or something. You've got to stick it through the thing and stick your money through there." Burbrink asked, "Would you remember the half pint if you heard it, what kind it was—was it?" And then I say, "Do you remember what kind it was? You said you thought you could or something a minute ago?" Crane replies: "I think it was Old Forester, I am not real sure." Milburn asked, "Would you recognize the label on it if you saw some of them—different types of liquor?" Crane replies: "I might would then." Then I asked, "Let's get back to the clerk for just a minute. Do you remember any type of clothing he had on, Major?" Major replied, "Huh-huh." Then I asked, "What color shirt he had on or anything? What did he say to you when you went in?" Crane: "He didn't say anything. He wasn't saying nothing. He was quiet. The man didn't say anything at all. Didn't nobody say anything to me." Then I asked, "And what did you say?" Crane replies: "That is when I told him to hold up, this was a holdup. Then I told him that this is a holdup and when I walked in there and when the lady was sitting in her car, when I told him that, he wasn't saying nothing. He didn't say nothing to me." Then I asked, "Was there anyone in there except you and George at the time?" Crane replies: "That lady, she got in her car. She had bought her stuff and was getting in her car. She pulled off. There wasn't nobody. I didn't see nobody else." I asked, "Do you remember what kind of car she got in?" Crane replies: "Huh-huh, I coudn't remember that." I asked, "Black lady? White lady?" Crane replies: "White lady." And then I asked again, "It was a white lady?" Mr. Crane replies: "No, I am getting confused." I asked "Okay, just take your time." Milburn asked, "Do you want to take a drink—want a drink?" Crane replies: "Thank you. I just wanted to know, is they going to lock me up down there?" And I asked, "Are you going to what?" Crane replies: "Lock me up today." Then Milburn replies: "Major, in reference to the liquor store, any particular reason why you went

to that liquor store?" Crane replies: "Because he was the only person in there." Milburn: "Had you been there before?" Crane replies: "A few times with my grandfather and my grandmother. They will buy something out of there." Milburn asked: "Have you been there that day other than when you went in there to rob it?" Crane replied: "I had watched; I had watched over there for awhile to see who goes in and out but you know, as far as going in there buying stuff, I don't really go in there." Milburn asked, "Do you remember what time it was during the day?" Crane replies, "It was about five, about four or five." Milburn: "In the morning?" Crane replies: "Uh-huh." Milburn: "Or afternoon?" Crane replies: "Afternoon." I asked, "Was it dark or light?" Crane replied: "It wasn't dark yet. It was going—it was about an hour—about a little while later, it would have been getting dark." I asked, "Go over again what kind of gun you had when you went in there." Crane replies: "I had a 357 when I went in there." I asked, "And what did George have?" Crane replied, "He didn't have nothing because I said—what I told you all, I said I didn't know whether he went and got the shotgun. I had it hid up under him or what." I asked, "So as far as you know, George didn't have anything." Crane replies: "Uh-huh." I asked, "Could he have had one?" Mr. Crane replied: "But I know he had money. I know he got some money out of there too." Burbrink asked, "Did you plan this beforehand with George, you and him talk about this before you went in?" Mr. Crane replied, "We talked about it." Burbrink asked, "What did you all say?" Crane replied: "How we could do it, the way we could do it." Burbrink asked, "So you and George discussed it. Did you go to George with this?" Crane replies: "I went to him, yes." Burbrink asked, "He agreed with you?" And Mr. Crane replied, "Yeah." Milburn: "So as far as you remember or as well as you remember, the clerk never said anything to you?" Crane replied: "Huh-huh." I asked then, "This gun that you are talking about that

you had there at the liquor store, where is it now?" Mr. Crane replied, "Over at Walter Whitaker's house." Then I asked, "Okay, do you know where Walter lives?" Mr. Crane replies: "Yeah." I asked, "What is his address?" Mr. Crane replied: "2906 Duminil." I then asked, "Do you know where it is at in the house?" Mr. Crane replied, "Yeah, I could take you right to it if I could go but I doubt if I could go." Branham, "Well, just tell me as best you can. Explain where it is at in Walter's house." Mr. Crane: "It is in his bedroom in his closet. The bedroom is—the bathroom is right there and his bedroom is right there next to the bathroom."

Branham, "Where does he live? Does he live there by himself?" Crane replies: "Uh-huh, with his three kids and his girlfriend." Burbrink asked, "Is it in the closet in the back of the closet or up in the closet?" Mr. Crane replied, "Up in the closet." Burbrink asked, "Is it hidden?" Crane replies: "Uh-huh, under some pocketbooks, my grandmother's old pocketbooks and stuff." I asked, "Is it chrome, is it blue or . . ." Mr. Crane: "Is it a nickel plated, it is just a nickel-plated 38 or something." Then I asked, "Are you sure it is a 357?" Mr. Crane replied, "I am positive." Then I asked, "Do you know your guns pretty good?" Mr. Crane replies: "Yeah, I could name any kind of gun if I look at it." And I asked, "Are you sure this is a 357?" Mr. Crane replied, "Yeah, I am positive." Then I asked, "How were you holding the gun? You said you shot in the air over there." Mr. Crane replies: "I shot like this because I couldn't shoot it like this. I started to shoot it like this but it jacks my arm back. So I shot it like this, straight up in the air." I then asked, "Where did you get the gun?" Mr. Crane replied, "That is the one I got out of the truck." Then I asked, "Okay, we are talking about the same one from earlier?" Mr. Crane replied: "Uh-huh."

Then I asked, "How did Walter come by the gun?" Mr. Crane replied, "Because George let him keep it that day when he got locked up. They took him down there to

Walter." Mr. Burbrink asked, "Walter got any other guns up there as far as you know?" Mr. Crane replied, "He has got knives." Burbrink: "What about the sawed-off, is that up in there?" Mr. Crane replied, "Yeah, that is in the closet too. It is setting in the closet where you put the shoes back in the closet, just setting up." I asked, "How many guns have you had in your possession say in the last three months?" Mr. Crane replied, "Three." I asked, "What kind were they?" Mr. Crane replied, "A 38.. a 357 Magnum and a sawed-off shotgun, double barrel."

Milburn asked, "Where did you get the sawed-off at?" Crane replies: "Where did I get the sawed-off? The sawed-off ain't mine; that is George's. George, he goes out and steals and he gets guns and he brings them over to my mother's and sells them to them or even to my aunt. My aunt has got guns that he done sold to them." Then I asked, "Well, has Walter been with you or anything? He is just holding the guns?" Crane replies: "He is just probably—he just keeps them for George but he ain't going to steal nothing from nobody—not Walter." Burbrink asked, "How old is Walter?" Mr. Crane replied, "Walter is 25; he just turned 25 years old." Burbrink: "Walter did?" Mr. Crane replies: "Yeah." Burbrink, "Do you know if he has ever been locked up?" Mr. Crane replied: "He has been locked up for terroristic threatening for Milton Harris."

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CROSS EXAMINATION

BY MR. JEWELL:

Q1 Detective Branham, at the time of the offense at Keg Liquor Store, would you estimate that at approximately 10:30 to 10:40?

A That is correct, yes sir.

Q2 So it would be in the p.m.?

A Yes sir.

Q3 That would be 10:30 to 10:40 at night?

A That is correct, yes.

Q4 And you determined also that the 32 caliber weapon had fired the bullet that struck Randall Todd, correct?

A That is correct, yes.

• • • •

Q16 Now by way of your investigation, you were able to determine that no money had been taken from the cash register, correct?

A That is correct.

Q17 And no money had been taken from a safe or a box or anything like that?

A Not as far as we could determine; no money at all was taken.

• • • •

Q34 Now in your investigation of this, did you determine whether or not this store had an alarm which would sound a siren or buzzer?

A It doesn't have an alarm, no sir.

• • • •

Q56 Detective, in the statement which you've just read, Major Crane said he shot up in the air, correct?

A Yes sir.

Q57 He says he shot up in the air because of the alarm and the sirens that went off, correct?

A Correct.

Q58 It was determined that there is no alarm in that store that would make a siren go off, right?

A Sir, the only alarm system in there was a fake camera and it was on the ceiling.

Q59 There is nothing in there that could cause a buzzer or an alarm to go off?

A No sir, not to my knowledge.

Q60 Major Crane said the man gave him $300 or $400, correct?

A Yes sir.

Q61 And he got it under the cash register, correct?

A Yes sir, he did.

Q62 And as far as you all could determine, no money was taken from the cash register, correct?

A That is correct.

Q63 In fact, the printout on the cash register read a little over, didn't it? The money in the cash register was a little over the printout, correct?

A I believe that is correct.

MR. JEWELL: I have no further questions.

REDIRECT EXAMINATION

BY MR. STENGEL:

Q1 Sir, referring to the tape recorded statement of Major Crane, page seven, the counter we are talking about there, if I was standing behind that counter and you were standing where a customer would stand, you would be unable to see my feet, is that correct?

A Yes sir.

Q2 Down about two inches up from the bottom of the page, right after Major says: "I told them this is a holdup", have you found that?

A Yes sir.

Q4 He then says, "I told him it is a holdup and then the man—his feet looked like it was a button or some-

thing that his feet touched on the floor." Is that correct? That is what he said?

A Yes sir.

Q5 And then he said, "Then sirens and stuff started going off." In fact, it would have been impossible for him to see the feet or a button on the floor.

A Yes sir, it would be impossible.

* * * *

[BENCH CONFERENCE: OBJECTIONS BY DEFENSE COUNSEL TRIAL TRANSCRIPT (TE VOL. II, PP. 43-44]

* * * *

(Bench discussion:)

MR. JEWELL: The Commonwealth—its next witness is Officer Burbrink. Again, we'll have to—well, we need to enter an objection to the Court's ruling that we can't ask about the time or the number of police officers present during the statement. We have not been able to find a case. However, in Palmore's instructions to the jury, there is an admonition in there that the jury must believe the voluntariness of the confession which would seem to allow this in. Also, we feel it would go to the credibility of the confession and not just the voluntariness.

THE COURT: This is noted for the record and your objection is overruled.

MR. STENGEL: I didn't know which way you were going to go and I told him to be prepared to go into the voluntariness. I have to tell him to clam it on that.

MR. JEWELL: Also, we need to ask Detective Burbrink to remain available after his testimony for the avowal. I'll have to do that outside the presence of the jury.

(Conclusion of bench discussion)

[AVOWAL EVIDENCE PRESENTED BY DEFENSE COUNSEL (TE VOL. V, PP. 14-25) TESTIMONY OF DET. WAYNE BRANHAM AND TESTIMONY OF DET. DONALD BURBRINK]

* * * *

MR. JEWELL: At this time, we would like to put on our avowal evidence, Judge, which we reserved at trial, that being Detective Branham.

THE COURT: Please take the stand, Detective.

MR. JEWELL: And we'd also have Detective Burbrink. I'll not ask that he be separated since this is going in by avowal.

THE COURT: Detective, you remain under the same oath as was previously administered to you. This evidence is offered into the record by way of an avowal, it having been ruled by the Court that it is not appropriate to have it brought before the jury.

AVOWAL TESTIMONY OF DETECTIVE WAYNE BRANHAM

BY MR. JEWELL:

Q1 Again, state your name.

A Detective Wayne Branham.

Q2 Detective Branham, you were involved in the taking of the statement from the Defendant, Major Crane, were you not?

A Yes sir.

Q3 On August 14th, did you receive a call from the City Police to meet them somewhere in reference to Major Crane?

A Yes sir, I did.

Q4 About what time was this?

A I believe it was about 6:50. I didn't bring my report up with me.

Q5 And where did you meet the city police at?

A I first met the city police at the Louisville Police Department Youth Bureau and I proceeded over to the Youth Center.

Q6 Did you talk with the Defendant, Major Crane, at the Youth Bureau?

A No.

Q7 Did you talk to him at the Detention Center?

A Yes sir, I did.

Q8 Did you arrive there at approximately 7:00 o'clock?

A That would probably have been about the correct time, yes sir.

Q9 And you then began questioning or talking with Major Crane at that time?

A Yes sir.

Q10 Now you took a waiver of rights at 7:45, correct?

A Yes sir, I believe so.

Q11 And the recorded statement did not begin until 7:50, correct?

A That is correct.

Q12 When you were at the Youth Center with Major Crane, were any of the social workers at the Youth Center present with him during your questioning?

A During the questioning, no sir.

Q13 Was any member of his family present?

A No sir.

Q14 Was anybody present besides Major and the police officers?

A No sir, there was not.

Q15 The room in which you did this questioning at the Youth Center, about how big was it?

A It is a small office. I'll estimate it at maybe probably 10′ x 10′ maybe.

Q16 And you were present at the questioning?

A Yes sir.

Q17 And Detective Milburn?

A Yes sir.

Q18 Detective Burbrink?

A Yes sir.

Q19 Detective Highland?

A Yes sir.

Q20 And was there any other persons present?

A I believe Sergeant Cummings was in the room too, with the Louisville Police Department.

Q21 And while you all were in this office, did you have the door open or closed?

A Sir, I don't recall whether it was open.

Q22 Does this office have any windows in it?

A No sir.

Q23 And this is the office where you first started talking a little after seven until the statement ended at 8:40, correct?

A That is correct. That was our office that was given to us there by the workers at the Center.

Q24 No worker from the Center stayed in there for the questioning, correct?

A No sir.

Q25 Did you request that one stay in there?

A No sir.

Q26 At any time, did you see Major Crane use the phone to call a family member?

A No sir.

Q27 At any time, did you, yourself, talk to the mother of Major Crane that evening?

A That evening?

Q28 While questioning was going on.

A No sir.

Q29 Say prior to 8:40?

A No sir.

MR. JEWELL: I have no further questions.

EXAMINATION OF DETECTIVE BRANHAM ON AVOWAL BY MR. DAVID STENGEL

Q1 Sir, how was Major Crane being treated during the time you were there?

A He was treated well. I think at one point, we asked him if he wanted a drink. He was seated at a table, as I recall, or a desk-type table.

Q2 Did you get him any sort of soft drinks, potato chips, anything like that?

A I know he was asked. I don't remember whether he requested one. If he did, I am sure he got one but I don't remember.

Q3 Would you describe his demeanor at the time.

A His demeanor was he was calm at the time. It was just a conversation-type situation.

Q4 Were you all seated, standing? What was the scene in there? Did you all have enough chairs to go around?

A As I recall, I was seated and I believe there was a couple of more chairs. I don't remember the exact arrangements. There may have been one or two officers standing.

Q5 Had you had any discussion prior to the time you started tape recording that statement?

A With?

Q6 With Crane.

A I talked to him briefly before but we went right into the recording.

Q7 Were any threats, promises, or anything else made to him there at that time?

A No sir.

Q8 Are you aware of attempts to contact his family?

A I am not aware, no sir. The workers there at the Center may have been attempting to contact them. I don't know.

Q9 At one time, he requested that he go to the rest-room, is that correct?

A That is correct.

Q10 And did he go?

A Yes sir, he did.

Q11 In your presence, was he abused, threatened or anything else in any way?

A No sir, he was not.

MR. STENGEL: Thank you, sir.

MR. JEWELL: I have no further questions.

THE COURT: Thank you, you may stand down. Other avowal evidence?

MR. JEWELL: Detective Burbrink.

THE COURT: Detective, you remain under the same oath as was previously administered to you.

AVOWAL TESTIMONY OF DETECTIVE DON BURBRINK—EXAMINATION BY MR. JEWELL:

Q1 Please state your name for the record, please.

A Detective Donald Burbrink, Louisville Division of Police, Fourth District.

Q2 Detective Burbrink, what is the first time you came in contact with Major Crane on August 7th?

A Approximately 1752 hours, 5:52 in the afternoon.

Q3 5:52 p.m.?

A Yes sir.

Q4 And you all remained at the substation for awhile after that, did you not?

A We left the substation at 1825. So by the time we got into the district, it was about 1800 or six o'clock, 6:00 p.m. So we were there approximately 25 minutes or enough time for me to type up a slip.

Q5 And then you took him to the Youth Bureau which is in Louisville Police Headquarters, correct?

A Yes sir.

Q6 And how long did you remain there?

A According to my time, we arrived there at 1838 and we left there at 1859.

Q7 Then you proceeded to the Youth Center, correct?

A Yes sir.

Q8 Where upon arrival after you all went into the Youth Center, you all went to a room for questioning, correct?

A Correct.

Q9 And you had called the County to come meet you at the Youth Bureau, correct?

A Yes sir.

Q10 Now when you arrived at the Detention Center, the room that you went to, was it down a hall from the admissions area?

A There is a long desk there in the admission area. There is a doorway there. You come out the door; you go to your left and it is about 10 yards down the hall.

Q11 And this room—would you agree with the description we had of about 10′ x 10′ perhaps?

A 10′ x 10′, 12′ x 12′, something like that, yes sir.

Q12 And this room had no windows?

A That is correct.

Q13 And during questioning, I am talking about from this time until the tape recorded statement ended at 8:40, was anybody else allowed in? Did anybody else come into the room besides Major Crane and the police officers?

A No sir, Detective Highland went back and forth getting Major some soft drinks and potato chips, etc, but nobody else entered, no sir.

Q14 No worker, no family member, nobody else?

A No sir.

Q15 And you were aware at this time that Major Crane was 16 years old, correct?

A Yes sir.

MR. JEWELL: I have no further questions.

EXAMINATION BY MR. STENGEL:

Q1 Sir, did you make any attempts to contact Major Crane's family?

A Yes sir, I did, several times. When we first picked him on up and brought him to the Fourth District Substation, I tried to call the mother. I talked to an aunt at

that time and told her what was going on with his charges, etc., and where he could be found and she said she would contact the mother and bring her to the Detention Center. I told her about what the timing would be. I called back again at 1912 when we first arrived at the Detention Center and there was no answer at home. And at that time, I assumed the mother and aunt were on the way. We left specific instructions with the people at the front desk, if the mother of Major Crane or an aunt or any family member were to come in, to take them back to the room where we were questioning him.

I called again before the statement started at 1945 and again there was no answer. After the statement, we tried repeatedly to call and finally talking to his grandmother later on.

Q2 Do you have a list of the repeatedlies there?

A Yes. Seven attempts of calling from 2043 until 2128.

Q3 And you say Detective Highland was coming and going with soft drinks, etc. for Major?

A Yes.

Q4 Did Major express any sort of discomfort or fear or any other negative feelings while you all were talking to him?

A No sir.

Q5 Describe his demeanor and his—well, first, his demeanor.

A He was calm just like you or I sitting here, just matter of fact about everything.

Q6 Could he be described as talkative?

A Oh, he was definitely talkative.

Q7 You talked about a considerable amount of things other than simply this offense, isn't that correct?

A Yes sir, that is correct.

Q8 And that was freely given or apparently freely given from Major to you?

A Yes sir.

Q9 Do you remember any requests that Major made that weren't acted upon or weren't granted?

A None whatsoever.

Q10 Any requests to call home?

A No sir, never requested to call home or requested to call anybody.

MR. STENGEL: Okay, thank you, sir.

REEXAMINATION BY MR. JEWELL:

Q1 Detective Burbrink, when you talked to the aunt over the phone, did you tell her that Major was being questioned in regards to a murder charge?

A He was not being questioned about a murder charge at that time, sir; so we did not have any reason to tell her that.

Q2 So as far as you know, at least from yourself, the family did not learn that he was being questioned on a murder charge prior to the statement, correct?

A That is correct, yes sir.

MR. JEWELL: I have no further questions.

THE COURT: Will counsel for the Defendant state upon the record again the purpose of this avowal.

MR. JEWELL: The purpose of the avowal, Judge, was earlier today, the Commonwealth moved by motion in limine that we not be allowed to go into the facts and circumstances surrounding the confession, such as how long the young man was in police custody, the fact that he had nobody there with him, since they felt that was heard at the suppression hearing and should not be heard in open court. We then stated we felt we had a right to ask the police officers those specific questions as it went to both voluntariness and credibility to be given a confession by a 16-year old in police custody at least a couple of hours with no family member present. The Court sustained the Commonwealth's motion, overruling our objection. Therefore, we felt we had to get this evidence in by avowal.

THE COURT: Thank you. The way the Court interprets RCr 9.78, it is evidenced in the file by the way the

Court handled the matter at a previous hearing. The Court is reinforced in that handling or in its decision and determination to handle it pursuant to RCr 9.78 by what has now been placed in the record, which was a total rehash of that which was heard at the suppression hearing which is required and which was held. The Court would only state to counsel that the provisions of the rule, that is RCr 9.78 are mandatory and were so accepted by this Court when it had a suppression hearing.

The Court entered, as it required by the rule, its findings. The Court notes that in the rule itself it is stated: "The trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.

If supported by substantial evidence, the factual findings of the trial court shall be conclusive." Since the time of the adoption of that rule, as it is presently worded, October 14, 1977, to be effective January 1, 1978, this rule has been treated most recently in the case of *Moore v. The Commonwealth*, wherein enigmatically, the appellate court held that while a hearing should have been conducted, the fact that it wasn't conducted when a motion was made on the day of trial was not prejudicial error. It sort of astounds this Court because I feel it is a fundamental right to have that hearing and I granted that hearing in this particular case.

In any event, if you wish to peruse that for some leisurely reading, it is at 634 SW 2nd 426 (1982 case). I am sure Mr. Jewell is familiar with it. I only cite that to the Commonwealth because of the burden of work that the Commonwealth has and it may have escaped their attention. Thank you, gentlemen.

I believe, also, the record should reflect that in addition to this latter point brought up at this time, the motion to suppress included further grounds of the infancy of the defendant, of his inability to comprehend the magnitude and the Court made a specific ruling on that point also.

JEFFERSON CIRCUIT COURT
DIVISION ONE

NOTICE-MOTION-ORDER

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

NOTICE

TO: Hon. David Stengel
Assistant Commonwealth's Attorney

Please take notice that the following motion will be made in the coutroom of the above Court, on Monday, December 12, 1983, at 8:30 a.m.

MOTION FOR NEW TRIAL

Comes the defendant, by counsel, pursuant to RCr 10.02, and moves this Court for a new trial on the charge of murder in the aforementioned indictment. The defendant, by counsel, states that he was prevented from having a fair trial and that, in the interest of justice, a new trial is required for the following reasons:

1. The defendant, Major Crane, was found guilty of wanton murder on December 1, 1983, after a three day jury trial in which the jury recommended a 40 year sentence of imprisonment.

2. The principal evidence for the Commonwealth was a confession given by the defendant to the police on August 14, 1981, in which the defendant admitted to shooting a gun in Keg Liquor Store on August 7, 1981.

3. In opening statement, defense counsel informed the jury that it would be presented with evidence of the circumstances surrounding the giving of the confession to

the police by Major Crane. Prior to the presentation of proof, the prosecutor moved this Court *in limine* to prohibit the defense from cross-examining the police officers about the circumstances surrounding the taking of the confession or from introducing any evidence which had been used at the suppression hearing on the issue of the voluntariness of the confession. Defense counsel responded that she was not attempting to relitigate the issue of voluntariness before the jury but was placing this information before the jury for it to use in weighing the credibility and validity of the confession.

4. This Court ruled that RCr 9.78 was controlling and that since this Court had found the confession to have been voluntarily given and thus admissible at trial, then the defense was prohibited from informing the jury about the circumstances surrounding the obtaining of the confession.

5. The evidence of the circumstances surrounding the obtaining of the defendant's confession which was produced by avowal—including the number of hours the defendant was held in the custody of the police for questioning, the number of officers present at the interrogation, the place where the interrogation was held, and the absence of any family member or friend at the interrogation—is clearly significant information for a jury on the issue of the credibility of the confession and the weight which it should be given. Such was the conclusion reached by the United States Supreme Court in *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (see accompanying memorandum for a fuller discussion).

6. This Court based its decision on RCr 9.78. As stated in the comment to that rule, however, the rule merely changes the procedural requirements of *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969). No substantive rights of the defendant were affected by the adoption of the rule; thus Kentucky case law clearly permits the defense to introduce evidence of the conditions under which the confession was obtained, including the evidence

which the trial court considered in ruling on the admissibility of the confession. *Karl v. Commonwealth*, Ky., 288 S.W.2d 628 (1956), and *Johnson v. Commonwealth*, Ky., 302 S.W.2d 585 (1957).

7. Failure to premit evidence of the circumstances surrounding the taking of the confession has resulted in a reversal of a defendant's conviction with an order for a new trial. *Karl v. Commonwealth, supra*; *Lewis v. Alabama*, Ala.App., 329 So.2d 596, Aff'd 329 So.2d 599 (1975); and *Kagebein v. Arkansas*, 496 S.W.2d 435 (1973).

8. For the foregoing reasons and from the aforementioned caselaw and that contained in the accompanying memorandum, it is clear that the defendant was denied a fair trial when this Court ruled that the jury could not be presented with evidence of the circumstances under which the defendant's confession was obtained.

WHEREFORE, the defendant respectfully requests this Court to set aside the verdict of the jury and to grant him a new trial.

[Certificate of Service Omitted in Printing]

JEFFERSON CIRCUIT COURT
DIVISION ONE

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

ORDER

Motion having been made and the Court being sufficiently advised.

IT IS HEREBY ORDERED that the defendant, Major Crane, be granted a new trial.

_____

Judge, Jefferson Circuit Court

DATE: _____

JEFFERSON CIRCUIT COURT
FIRST DIVISION

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL

Prior to 1964, the issue of the voluntary nature of a defendant's confession was determined by one of three methods. The orthodox method required that the trial judge conclusively determine the issue of voluntariness and this was usually done outside of the hearing of the jury. The Massachusetts procedure dictated that the trial judge first determine whether the confession was voluntarily made and, if he found it to be voluntary, then the confession was submitted to the jury which reconsidered the issue of voluntariness. Under the New York rule, the judge made a preliminary determination of the voluntariness of the confession and excluded it only if under no circumstances could it be found to be voluntary; otherwise the jury determined not only the truthfulness of the confession but also whether it was given voluntarily.

In 1964, the U.S. Supreme Court decided the case of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964), where it found the New York rule unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Supreme Court held that under the New York rule, it could not be determined from the jury's verdict whether the jury had found the confession

to be voluntary and thus relied on it or whether it was found to be involuntary and ignored. Further, the Court had serious doubts as to whether a jury could separate the issue of voluntariness of a confession from the issue of its believability. The Court determined that the issue of voluntariness must first be determined by the court before the confession is submitted to the jury.

The issue before the Supreme Court in *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), concerned the burden of proof standard by which the prosecution must establish the voluntary nature of a confession. It was held that the trial court must find the confession to be voluntarily given by a preponderance of the evidence before submitting it to a jury. The Court also addressed the issue of whether the circumstances surrounding the taking of the confession was evidence for the jury by stating:

> Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulnes sof confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. *Id.*, 404 U.S. at 485-486, 92 S.Ct. at 625, 30 L.Ed.2d 618.

Thus the Supreme Court's opinion in *Lego v. Twomey*, *supra*, makes it clear that a trial court cannot constitutionally prohibit a defendant from introducing evidence of the circumstances surrounding the giving of a confession to a jury for its consideration as to the credibility of the confession as well as the weight it is to be given.

Kentucky courts have also addressed this issue. In 1956 the rule in Kentucky was that the court decided the question of whether the confession was voluntarily given, but the defense was free to introduce evidence of the sur-

rounding circumstances because of its direct bearing on the credibility and weight which the jury should attach to the confession. Thus in *Karl v. Commonwealth*, Ky., 288 S.W.2d 628 (1956), the court held:

> If the confession is held inadmissible, the accused has been protected since the jury has not heard the prejudicial evidence of an involuntary statement. If the statement is held competent and admissible, the statute will have fulfilled its purpose; that is. to protect the accused against introduction of a statement involuntarily obtained. The statute would have no further function or application. The confession, having been held competent and admissible, should then be introduced into evidence as any other statement, whether written or oral, and placed on the same basis as any other character of evidence insofar as its credibility is concerned. The defendant may then present to the jury evidence, in the nature of rebuttal, as to the conditions under which it was obtained, that he did not make the confession, or tending to contradict, discredit, or lessen the weight thereof. Either party then has a right to produce before the jury the same evidence which was submitted to the court when the court was called upon to decide the question of competency and admissibility and all other facts and circumstances relevant to the confession or affecting its weight or credit as evidence. This rule is in accord with the weight of authority. 20 Am.Jur., Evidence, Section 538, page 457; 22 C.J.S. Criminal Law, § 834, page 1458; Wigmore on Evidence (3rd Ed.), Volume 3, Section 861, pages 348-9. See Annotations, 170 A.L.R. 567. See also State v. Crank, 105 Utah 332, 142 P.2d 178, 170 A.L.R. 542 (*Id.* at 633).

At that time Kentucky was following the orthodox rule which was found in KRS 422.110, commonly known as the "Anti-Sweating Act". See also *Johnson v. Commonwealth*, Ky., 302 S.W.2d 585 (1957), where it was reiterated that once the confession is found to be voluntary by the court then the defense may introduce evidence attacking its credibility.

By 1969, Kentucky had adopted the Massachusetts procedure of having the trial judge first determine the admissibility of the confession and then resubmitting that issue to the jury for it to find voluntariness beyond a reasonable doubt. See *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969). In 1978, RCr 9.78 went into effect; it reads:

> If at any time before a trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

The purpose of the rule is stated in the comment which follows it; the rule modifies the procedural requirements of *Bradley v. Commonwealth, supra*, by having the trial court solely make the determination of voluntariness and by eliminating the beyond a reasonable standard as recognized in *Lego v. Twomey, supra*. Thus RCr 9.78 places Kentucky once again under the orthodox rule as defined in *Karl v. Commonwealth, supra*.

Nothing in RCr 9.78 or in the comment to that rule takes away the defendant's right to present to the jury all evidence which has a bearing on the weight or credibility of his confession. RCr 9.78 merely changes the procedural requirements of *Bradley v. Commonwealth*,

supra, but does nothing to affect any substantive rights of the defendant.

Case law from other jurisdictions also establishes a defendant's right to present to the jury the same evidence which was presented at the suppression hearing because of its bearing on the credibility of the confession. In *Lewis v. Alabama*, Ala.App., 329 So.2d 596, Aff'd 329 So.2d 599 (1975), the court stated that it would follow the orthodox rule requiring the trial court to decide the issue of voluntariness conclusively. The court there cited Corpus Juris Secundum on the jury's function regarding the confession:

> In connection with, and for the purpose of making its determination as to, the weight and credibility of confessions, the jury, under proper instructions, may and should hear and consider evidence of circumstances as to the voluntary character of the confession. Thus, it has been held that if the confession was found by the court in the preliminary hearing to have been freely and voluntarily made and is admitted in evidence, the evidence given on the preliminary examination to determine its admissibility may or should be replaced before the jury to enable them to pass on the credibility of the confession. 23 C.J.S. Criminal Law § 843, p. 297.

The Alabama court reversed the defendant's conviction in *Lewis v. Alabama*, *supra*, for failing to admit evidence of the circumstances under which the confession was obtained because "[t]he jury in determining the weight and credibility of the confession was entitled to consider the predicative evidence." 329 So.2d at 598. The relevant Alabama statute is similar to Kentucky's RCr 9.78; Alabama Code § 43-2105 states in pertinent part:

> Issues of fact shall be tried by a jury, provided that the determination of fact concerning the admissibility of a confession shall be made by the court when the issue is raised by the defendant. . .

Similarly, in *Kagebein v. Arkansas*, 496 S.W.2d 435 (1973), the court interrupted defense counsel on cross-examination of the police officer who took the defendant's statement and told him he was prohibited from questioning the witness on the circumstances surrounding the confession. In reversing the defendant's conviction, the Supreme Court of Arkansas held:

> The purpose of our *Denno* hearing statute (Ark. Stats. 43-2105) is to prevent a jury from hearing a confession before the court determines that it has been voluntarily given. It is not intended to restrict evidence a jury may hear after a court determination of voluntariness has been made. The defendant still has the constitutional right to have his case heard on the merits by a jury, including the weight and credibility the jury might give to the voluntariness of the confession. *Id.*, at 440, citing *Lego v. Twomey*, *supra*.

The courts in *Iowa v. Holland*, 138 N.W.2d 86 (1965), *Calloway v. Florida*, 189 So.2d 617 (1966), and *Witt v. Commonwealth*, 215 Va. 670, 212 S.E.2d 293 (1975), n.1, likewise hold that submission to the jury of the circumstances surrounding the taking of the confession is not for the purpose of having the jury relitigate the issue of voluntariness "but as bearing upon the weight to be accorded [the confession] and the credibility of the witnesses who testified regarding the confession". *Iowa v. Holland*, *supra*, at 91.

Although no reported cases have been found in Kentucky on this issue since the adoption of RCr 9.78, it is clear from the Supreme Court decisions in *Jackson v. Denno* and *Lego v. Twomey*, both *supra*, that the trial court must initially decide the issue of voluntariness before permitting the jury to hear the defendant's confession; but once the confession is found to be freely given by a preponderance of the evidence then the defense has the right to produce that same evidence before

the jury for it to use in determining the weight and credibility to be given the confession. Both Kentucky case law prior to the effective date of RCr 9.78 and case law from other jurisdictions on this issue has held this to be the correct procedure and constitutionally required as a right belonging to the defendant.

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JEFFERSON CIRCUIT COURT
FIRST DIVISION

Indictment No. 82CR1544

CHARGE: MURDER

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

FINAL JUDGMENT
SENTENCE OF IMPRISONMENT

The defendant having entered a plea of not guilty and on the 1st day of December, 1983, a jury having returned a verdict that the defendant was guilty of the crime of MURDER and fixed his sentence at forty (40) years;

On this 5th day of January, 1984, the defendant, Major Crane, appeared in open Court with his attorney, Honorable Franklin P. Jewell, and the Court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment and the Court having provided the defendant, through his attorney, with a copy of the written report of the presentence investigation prepared by the Division of Probation and Parole, and the Court having given due consideration to the said written report of the presentence investigation prepared by the Division of Probation and

Parole and to the nature and circumstances of the crime and to the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because:

(a) there is substantial risk, that the defendant will commit another crime during any period of probation or conditional discharge.

(b) the defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institute.

(c) probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant and it is therefore ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of the crime of MURDER and his sentence is hereby fixed at a maximum term of forty (40) years at hard labor in the State Penitentiary; and

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is hereby credited with time spent in custody prior to the commencement of sentence; namely, 510 days, toward service of the maximum term of the imprisonment, or whatever time he has served on this charge only.

IT IS FURTHER ORDERED that the Sheriff of Jefferson County deliver the defendant to the custody of the Department of Corrections hereunder at such location within this state as the Department shall designate.

After imposing sentence, the Court informed the defendant that he has a right to appeal to the Supreme Court of Kentucky with the assistance of counsel; that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him; that an appeal must be taken within ten days of the date of this judgment, and that the Clerk of the Court would prepare and file a notice of appeal in his behalf within that time if he so

requests. Pending appeal the defendant is remanded to the Corrections Department.

/s/ Joseph H. Eckert
JOSEPH H. ECKERT
Judge

January 5, 1984

SUPREME COURT OF KENTUCKY

No. 84-SC-407-MR

MAJOR CRANE, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Rendered: February 28, 1985

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH ECKERT, JUDGE
No. 82-CR-1544

OPINION OF THE COURT BY JUSTICE GANT

AFFIRMING

Appellant was convicted of wanton murder of the clerk of a liquor store during a robbery, and sentenced to 40 years imprisonment. The single issue on this appeal concerns a confession by the appellant, and poses a question of first impression.

Prior to trial, appellant moved to suppress his confession pursuant to RCr 9.78, which reads:

> Rule 9.78. Confessions and searches—Suppression of evidence.—If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

The trial judge conducted a lengthy hearing and denied the motion to suppress, finding the confession to be voluntary. He made extensive findings of fact and conclusions of law covering the hearing and the contentions of the appellant that: There was no coercion or sweating; there was no overreaching by the interrogating officers; there was no inordinate or undue delay; the detention was normal and not under repressive circumstances; despite his youth, appellant had numerous exposures to the authorities and was "street wise"; and appellant was fully informed of and understood his rights.

At trial, appellant did not testify, but sought to introduce through the interrogating officers, before the jury, the same evidence of the circumstances surrounding the taking of the confession, which evidence was denied upon motion by the Commonwealth.

It is important to note the request of the appellant and the ruling of the court. By avowal testimony and argument to this court, appellant designates that his intention was to elicit such information as the length of time appellant was detained, the size of the room in which he was questioned, the number of officers present, the absence of a member of his family or a social worker, etc. The effect of the ruling of the trial court was that this evidence related solely to voluntariness and would not be admitted. However, the trial court specifically ruled that counsel for appellant could develop any evidence from any source, including the interrogating officers, relating to "credibility and inconsistencies." It is also noteworthy that appellant concedes that he was allowed to fully develop the "inconsistencies and mistakes of fact" in the

confession. However, he contends that, although under our law the jury is not permitted to pass upon the voluntariness issue, the circumstances under which the confession was given should be admitted in order to reflect upon credibility.

The roots of this case are firmly implanted in *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), and *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). These cases, in essence, provide that an accused must be permitted to attack the admissibility of evidence such as a confession or the fruits of a search before that evidence is introduced at trial. The several states are left to their own procedure as long as adequate safeguards are prescribed. Two general categories have evolved through the years which are approved by these two cases. One of these has been designated as the "orthodox" rule, under which Kentucky has cast its lot with the enactment of RCr 9.78. The orthodox rule provides that the trial judge *alone* shall determine the voluntariness of a confession or the admissibility of the fruits of a search.[1] The other rule is known as the Massachusetts or federal rule, under which the judge makes the original determination of voluntariness and, if the evidence is admitted, the circumstances of the confession (or consent to search) are placed in evidence with the advice that the jury may consider the evidence only if it finds that the confession or consent was voluntary.

Under the orthodox rule, a certain procedure has developed. The trial judge first conducts an evidentiary hearing on voluntariness, but is admonished by the United States Supreme Court that the judge cannot consider the reliability, credibility or authenticity of the confession in

[1] Cf. *Diehl v. Commonwealth*, Ky., 673 S.W.2d 711 (1984), in which this court held there was no error in excluding testimony before the jury concerning the voluntariness of a consent to search where the judge had ruled, upon substantial evidence, that the consent was voluntary. In this case we ruled that the findings of the judge were conclusive as to the issue raised.

determining its voluntariness. See *Lego v. Twomey*, *supra*, at 404 U.S. 484, 92 S. Ct. 624, Footnote 12. Then, in some cases, the jury is permitted to head the same evidence, usually without testimony of the defendant, but advised they cannot consider voluntariness but may consider only that evidence which relates to credibility. The Supreme Court acknowledges that these separations are difficult.

The history of these suppression hearings in Kentucky is likewise of importance. Following *Jackson v. Denno*, *supra*, this court decided the case of *Bradley v. Commonwealth*, Ky., 439 S.W. 2d 61 (1969). See also *Britt v. Commonwealth*, Ky., 512 S.W.2d 496 (1974). This court adopted RCr 9.78, effective January 1, 1978, subsequent to our decision in *Bradley*, *supra*, and clearly modifies the procedural requirements announced in that case.

It is the opinion of this court that there was no error in excluding from the jury the circumstances relating solely to voluntariness. As we said in *Diehl v. Commonwealth*, *supra*, the findings of the trial court were conclusive on that issue. In this case, appellant was permitted to show, upon examination of an interrogating officer, that the confession contained a misdescription of the weapon used in the homicide; that it spoke of a burglar alarm when there was none; that it told of taking money from a cash drawer when none was taken, and spoke of a gun being fired which had not been fired. Appellant was permitted to question the officer about suggesting material to the appellant during a break in the taping process. It is our further opinion that the excluded testimony related solely to voluntariness. It did not relate to the credibility of the confession, but to the credibility of the trial judge and his ruling on voluntariness, the latter being the function of the appellate court, not the jury.

The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the

difficulty in separation of those factors relating to voluntariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded.

It is the holding of this court that, once a hearing is conducted pursuant to RCr 9.78 and a finding is made by the judge based upon substantial evidence that the confession was voluntary, that finding is conclusive and the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession.

The judgment is affirmed.

All concur except Leibson, J., who dissents and files a dissenting opinion.

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SUPREME COURT OF KENTUCKY

84-SC-407-MR

MAJOR CRANE, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Rendered: February 28, 1985

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOSEPH ECKERT, JUDGE
(Indictment No. 82-CR-1544)

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent. There is no articulable distinction between evidence relative to voluntariness and evidence relevant to credibility. Evidence that a confession was coerced, of physical or psychological intimidation surrounding the taking of the confession, is relevant to its credibility. It bears on its truthfulness.

The fact that the trial judge has already considered the same evidence in making a decision whether to admit or exclude the confession makes no difference. Neither does the fact that under RCr 9.78 it is solely the function of the judge to decide whether to admit the confession.

The jury must still decide guilt. The same evidence that the judge heard in deciding to admit the confession

must now be heard a second time before the jury, because the evidence bears on the credibility of the confession, an essential consideration in deciding guilt. The judge's decision about coercion does not preempt the jury's need to consider evidence about coercion in deciding guilt.

The fundamental principle which we should apply has been summarized in Lawson, *Kentucky Evidence Law Handbook*, § 1.10(A) (2nd ed. 1984), as follows:

> "Multiple Purposes: Evidence that would be admissible if used by the jury for one purpose but inadmissible if used for another purpose should be admitted when offered for the proper purpose."

The trial judge's decision that the confession was not involuntary, or that he rejects the evidence of coercion, has no bearing on its subsequent use before the jury as relevant to the credibility of the confession.

RCr 9.78 was enacted to bring our procedure in compliance with United States Supreme Court decisions in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) and its progeny, which includes *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, 1972).

Jackson in 1964 mandated a pretrial hearing procedure at which the trial judge must decide on the admissibility of a confession when challenged as involuntry. Only then will the jury be permitted to consider it. Following *Jackson* there was confusion as to whether *Jackson* eliminated any further need for the jury to consider voluntariness as a threshold before considering the confession. But this threshold question has no bearing on the relevance of such evidence to the credibility issue.

During the period while there was confusion about the meaning of *Jackson*, we adopted the *Bradley* rule. *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969). This rule gave the accused a second bite at the threshold issue as whether the confession should be entirely disregarded.

We stated that even though the trial judge has decided the evidence was admissible:

> "[T]he trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented . . . ." 439 S.W.2d at 64.

The effect of RCr 9.78, effective January 1, 1978, is to eliminate the *Bradley* procedure, the jury's second bite at the suppression issue. But the 1978 change did not, and could not, restrict the admissibility of evidence regarding the circumstances surrounding the taking of a confession. Once the confession has been admitted into evidence, this evidence is relevant to the weight and credibility of that confession. Our holding to the contrary is not just a matter of misinterpreting RCr 9.78. It is a constitutionally impermissible interference with the accused's right to challenge the credibility of the evidence against him.

Lego v. Twomey, supra, serves to clarify the confusion which followed *Jackson v. Denno*. It explains that the rule in *Jackson* does not limit the defendant's right to present the same evidence which the judge has considered and rejected at the time he decided voluntariness when ruling on the admissibility of the confession. Such evidence may be offered *once more before the jury*, so that the jury may now weigh this same evidence in considering the credibility of the confession, even though the confession has been admitted into evidence. *Lego* states:

> "A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief." 404 U.S. at 485-86.

Lego explains the reason that such evidence is admissible a second time as follows:

> "Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence." 404 U.S. at 485.

Thus *Lego* explains that the United States Supreme Court's purpose in *Jackson* in requiring a preliminary suppression hearing was to keep confessions from coming before the jury, *whether true or false*, if involuntarily obtained. The jury must still consider whether the confession is true, and evidence of coercion bears directly on the question. The Supreme Court states that the *Jackson* "case was not aimed at reducing the possibility of convicting innocent men." *Lego, supra* at 485. As restated in the headnote to *Lego v. Twomey*:

> "4. The rule excluding coerced confessions from evidence does not preclude an accused, once his confession is admitted in evidence, from familiarizing the jury with the circumstances surrounding the confession, including facts bearing on its weight and voluntariness, and does not preclude the jury from disregarding a confession which is insufficiently corroborated or otherwise deemed unworthy of belief." 30 L.Ed.2d at 619-20.

The majority opines that there are two rules on this subject, an "orthodox" rule followed in Kentucky and a "Massachusetts or federal rule" which, presumably, is different. There may be room for two procedures; one where the trial judge alone decides on admissibility, and a second where after the trial judge decides to admit the confession, the jury is instructed to consider voluntariness a second time as a threshold before considering the confession. But either way the jury may still consider evidence of coercion as bearing on the weight to

be given a confession. The only difference is that in one case there would be no separate instruction to the jury to consider voluntariness as a threshold to be crossed before giving any consideration to the confession.

In *Hamilton v. Commonwealth*, Ky., 580 S.W.2d 208 (1979), we state:

> "The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. . . . [I]t follows that there was no error in [the trial court's] failure to present the issue of voluntariness to the jury." 580 S.W.2d at 210.

This case says "to present the *issue* of voluntariness to the jury," but nothing about presenting evidence of coercion to the jury. It means only that there is no need to *instruct* the jury to consider voluntariness as a threshold issue before considering the confession. This has nothing to do with the duty to admit evidence bearing on the credibility of the confession, and coercion fits squarely under that heading.

State v. Urscanin, 266 N.W.2d 880 (Minn. 1978) illustrates the meaning of "the so-called 'orthodox rule,'" which Kentucky has adopted. It explains that the court's preliminary hearing considering voluntariness is conclusive as to "whether the confession is admissible." *Id.* But it further explains:

> "[I]f it is admissible, the court admits it *and evidence surrounding the making of the confession.* It does not invite the jury to deliberate on the issues relating to admissibility, but only on *those relating to weight and credibility.*" 266 N.W.2d at 881. (Emphasis added.)

We have gone an impermissible step further. We not only withdraw from the jury any further consideration of admissibility, but we also withdraw any further con-

sideration of "those [issues] relating to weight and credibility." *Id.*

There is an obvious distinction between the situation with regard to voluntariness of a confession and the situation with regard to consent to search. Whether the consent to search was voluntary or not is completely unrelated to the credibility of the evidence obtained in the search. Both situations are the same in that if the trial court finds that the confession was obtained as a result of coercion or the search conducted by coercion, the evidence should be suppressed. The difference is that effecting a search by coercion has no bearing on the credibility of the physical evidence obtained as a result of the search, but obtaining a confession by coercion has a direct bearing on the credibility of the confession. *Diehl v. Commonwealth*, Ky., 673 S.W.2d 711 (1984), cited in the majority opinion, is not dispositive of the issue before us. It is inapposite.

This case should be reversed and remanded with directions that, regardless of the trial judge's finding of fact as to the admissibility of the confession, the jury should be permitted to consider evidence of coercive circumstances surrounding its taking.

SUPREME COURT OF KENTUCKY

84-SC-407-MR

MAJOR CRANE, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
#82-CR-1544

HONORABLE JOSEPH ECKERT, JUDGE

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied.

All concur.

ENTERED June 13, 1985.

/s/ ROBERT F. STEPHENS
Chief Justice

SUPREME COURT OF KENTUCKY

No. 85-5238

MAJOR CRANE, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 9, 1985